Supreme Court, U.S.
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(2)

No. 98-1810

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1998

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE SCHOOL DISTRICT, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
ANCHORAGE EDUCATION ASSOCIATION, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
JOHN PATTERSON, *Respondent*

SHERRY L. McGINNIS, *Petitioner*
v.
CHANCY CROFT, *Respondent*

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT, CHANCY CROFT'S BRIEF IN OPPOSITION

Chancy Croft, Counsel *Pro se*
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1998

QUESTION PRESENTED FOR REVIEW

As to one Respondent the question for the court to consider is this:

1. Should this court grant certiorari when (a) four of the six causes of action (c/a) Petitioner Sherry L. McGinnis (McGinnis) alleged against Respondent Chancy Croft (Croft) were dismissed by the trial court without opposition by McGinnis, (b) dismissal of the fifth cause was not argued by McGinnis on appeal and (c) McGinnis dismissed the sixth cause with prejudice approximately two months before trial?

Statement of Case

McGinnis sued Croft and three others for $60,000,000 (Sixty Million Dollars). (Appendix A) In cause of action 15 of her 29 page complaint McGinnis alleged that all four respondents had inflicted severe emotional and physical distress upon her. At her June 1995 deposition, McGinnis claimed that the severe physical and emotional distress had caused her to have headaches, irritability, nausea and sleeping problems. (Appendix B)

Upon cross examination she admitted that since 1991 she had not been diagnosed with any of these conditions and when asked if a "physician, physician's assistant, chiropractor, osteopath, naturopath, your own personal television psychic, a healer, a counselor, a social worker, person of any type" had treated her for any of these four conditions between 1991 and 1995 she replied simply "I have seen no one." (Appendix C)

A conspiracy by Croft with the Anchorage School District to inflict severe emotional stress on McGinnis was 1 of 6 causes of action McGinnis alleged against Croft in August of 1994. She first alleged breach of contract (c/a 9), added intentional misrepresentation of fact (c/a 10), claimed negligence (c/a 11), plead conversion (c/a 12) followed with conspiracy (c/a 14) and ended

with intentional infliction of severe emotional and physical distress (c/a 15).

By November of 1997 all six causes of action had been dismissed. Five were dismissed by Judge John W. Sedwick on Croft's motion for summary judgment. As to four of those five - intentional misrepresentation of fact (c/a 10), negligence (c/a 11), conspiracy (c/a 14) and intentional infliction of severe emotional and physical distress (c/a 15), McGinnis did not oppose Croft's motion for summary judgment. That's correct! McGinnis is now asking this court to grant a petition of certiorari over four items she did not even argue in the trial court. You don't have to take my word on it. We have the solemn declaration of her attorney at the time, Steven Finley. McGinnis' trial attorney solemnly declared that McGinnis did not oppose Croft's motion for summary judgment on her claims of (1) intentional misrepresentation (c/a 10), (2) conspiracy (c/a 13) and infliction of emotional distress (c/a 15). (Appendix D)

The fourth claim, the one for negligence (c/a 11) was not opposed even though Finley's declaration did not admit as much. But the response he filed to Croft's motion for summary judgment contained an express statement that no opposition to the dismissal was being filed. Strangely and inexplicably but none the less clearly, McGinnis' opposition said "Plaintiff's proof of

Croft's negligence and conspiracy with ASD are reserved for trial, but are not at issue here for purposes of Plaintiff's summary adjudication motion." (Appendix E)

The fifth claim - conversion (c/a 12) - was abandoned on appeal when McGinnis did not brief or argue it at all. (Appendix F)

The sixth and last claim, breach of contract, involved the same damages - reimbursement of medical expenses, compensation and disability benefits, penalty and interest - as McGinnis had sought under her claim of negligence against Croft. This claim - the breach of contract - the District Court refused to dismiss on summary judgment. It was set for trial to commence on January 5, 1998 in Anchorage, Alaska. The trial never happened. Instead of going to trial, McGinnis voluntarily stipulated to dismiss all her remaining claims against Croft in late October 1997. This stipulation for dismissal was with prejudice. (Appendix G)

ARGUMENT

In her 14 page petition McGinnis does not mention Croft by name at all. There are two references that indubitably refer to him without mentioning his name.

Overtly or covertly, McGinnis' petition involves Croft even though it primarily is addressed to her claim against the Anchorage School District. However, at no point in her petition does McGinnis

admit, address or argue that it was her own action that brought her case to conclusion. She does not advance any reason why she did not oppose Croft's motions for summary judgment, why she did not argue the fifth point on appeal or why she now wants this court to grant a petition for certiorari when she voluntarily stipulated to dismiss the remaining cause of action. Voluntary dismissal, Parks School of Business, Inc. v. Symington, 51 F.3d 1480 (9th Cir. 1995), like an attempt to argue the first time on appeal, Hunt v. Pan America Energy, 540 F.2d 894 (8th Cir. 1976), precludes appellate review.

CONCLUSION

Croft denies that there was or is any validity to any of McGinnis' claims. For purposes of her petition, McGinnis' actions themselves were sufficient reasons alone for the court of appeals to have affirmed the trial court. She did not acknowledge or address in her petition her lack of opposition, her abandonment or her stipulation to dismiss with prejudice. There is no reason advanced by McGinnis for this court to undo what she has done to herself.

Dated June 7, 1999

Respectfully submitted,

Chancy Croft, Counsel *Pro se*
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TEL: (907) 272-3508

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE JUDICIAL DISTRICT OF ALASKA

SHERRY L. MCGINNIS	) Case No. A94-) 0185CV (JWS)
Plaintiff,	)
ANCHORAGE SCHOOL DISTRICT, ANCHORAGE EDUCATION ASSOCIATION, and CHANCY CROFT and JOHN PATTERSON as individuals	) PLAINTIFF'S) INITIAL) DISCLOSURES)) (Fed.R.Civ.) P. Rule 26)
Defendants.	)

PRELIMINARY STATEMENT

Plaintiff, Sherry L. McGinnis, hereby discloses the following information in compliance with Fed.R.Civ.P., Rule 26. Plaintiff has not fully completed an investigation of the facts relative to this case and the following disclosures are made without prejudice to Plaintiff's right to disclose subsequently discovered facts. The disclosures herein are made in a good faith effort to supply such factual information that is presently known to Plaintiff. Plaintiff expressly reserves the right to all litigation and evidentiary privileges including, but not limited to, attorney-client, physician-patient, and spousal communication, and the applicable privilege is not waived by virtue of this mandatory disclosure.

A. The following individuals are likely to have discoverable information concerning the identified subjects and relevant to disputed facts

alleged with particularity in the Complaint. Addresses and telephone numbers are provided to the extent know to Plaintiff.

Interest through 8/25/94 @ 10.5% on late payment by ASD of $114,817.17 for medical expenses incurred and pursuant to Alaska Workers' Compensation Act and Alaska Statutes (Remanded to AWCB by the Superior Court in case #3AN-90-4827 Civil, abandoned by Chancy Croft) 28,875.72

Penalty through 8/25/94 @20.0% on late payment by ASD of $114,813.17 for medical expenses incurred and pursuant to Alaska Workers' Compensation Act and Alaska Statutes (Abandoned by Chancy Croft) 22,962.63

CONTRACT (BACK-PAY) AND TORT DAMAGES SOUGHT IN THE COMPLAINT IN THE STATE ACTION AGAINST ANCHORAGE SCHOOL DISTRICT BUT ABANDONED BY JOHN PATTERSON AND ANCHORAGE EDUCATION ASSOCIATION

Back Pay for:
School Years 1989-1992 @33,800 ('88 - '89 contract) $101,400.00

Tort damages for wrongful discharge:
Prayer of 1988 Complaint seeks amount not less than: 35,000.00

CONTRACT DAMAGES FROM ANCHORAGE SCHOOL DISTRICT'S WRONGFUL TERMINATION IN 1992

Back pay after 1992 termination by Anchorage District at Ph.D. salary level published by Anchorage School District in August, 1992:

School Year:	1992-1993	$ 48,821.00
	1993-1994	48,821.00+
	1994-	(unknown)

PAIN AND SUFFERING

Severe physical and emotional stress and distress $10,000,000.00

PUNITIVE DAMAGES AGAINST ALL DEFENDANTS $50,000,000.00

VALUE OF TENURE BENEFITS, INCLUDING BUT NOT LIMITED TO, HEALTH CARE COVERAGE, PENSION BENEFITS, AND TAX DEFERRED RETIREMENT BENEFITS (value unknown)

INTEREST ON ALL AMOUNTS AT THE MAXIMUM LAWFUL PERCENTAGE RATE (value unknown)

ATTORNEYS' FEES AND COSTS AS PROVIDED BY LAW (value unknown)

Q But you do recall that you alleged in the complaint that the defendants inflicted upon you severe emotional distress?
A That's correct.
Q Okay. And is that the time of $10 million that you were referring to in the -- the preliminary statement.
A I would say it probably is, yes.
Q Okay. If you will, describe for me all of the physical or emotional distresses that you had; the factual basis for your complaint that you've suffered severe emotional physical and emotional stress or distress.
A Are you asking for physical manifestations?
Q Yes.
A Those were presented yesterday. That's already been asked.
Q And -- and the emotional?
A I believe that was all answered yesterday.
Q And what was answered was headaches, is that correct?
A Yes, headaches was one thing I mentioned.
Q Irritability, is that correct?
A Yes.
Q Nausea?
A Yes.
Q And sleeping problems. Is that correct?
A Difficulty sleeping, yes.
Q And -- and those were the only four things you mentioned, isn't that correct?
A I don't recall if those were the only four or not.
Q Okay. What others are there?
A I -- I -- I can't think of others right offhand.
Q Okay. So -- so all you can think of now is headaches, irritability, nausea and trouble sleeping? Am I correct?

THE REPORTER: I'm sorry, I ... (indiscernible)
MR. CROFT: I don't think she's answered yet.

A Those are the disturbances I can think of at this time. yes

Q When did the headaches first begin?

A I don't recall.

Q Well, when did the irritability first begin?

A I don't recall exactly. I would, as I recall, probably some time in 1989.

Q When did the nausea begin?

A I would say about the same time.

Q And the sleeping problems?

A Also in 1989 I would say.

Q How often do you have headaches?

Q And you believe that all four of those conditions: headaches, irritability, nausea and problems sleeping are due to the actions of the four defendants that you named in the complaint?

A I do, yes.

Q And are there any other substantial factors in your having headaches besides the action of the four defendants in your condition?

A I don't believe so, no.

Q Any other substantial factors in your having irritability other than the actions of the four defendants?

A I don't believe so.

Q Any other substantial factors due to your having nausea besides the action of the four defendants?

A I don't believe so.

Q And any other substantial factor in your having sleeping problems other than the action of the four defendants?

A I don't believe so.

Q Now, have you seen for any type of treatment for headaches, irritability, nausea or sleeping problems in 1995?

A I've seen no -- no physicians.

Q No, I didn't say physicians. I said -- I didn't mean to if I did so let me correct it. I meant who have you seen for treatment whether it's a physician, physician's assistant, chiropractor, osteopath, naturopath, your own personal television psychic, a healer, a counselor, a social worker, person of any type for any of the problems in order to obtain relief from them during 1995?

A I have seen no one.

Q And the same question, who have you seen to obtain relief from these problems in 1994?
A I have not seen anyone.
Q And the question regarding 1993?
A I have not seen anyone.
Q And the same question regarding 1992?
A I have -- I have not seen anyone.
Q 1991?
A I don't believe I saw anyone that year as well.
Q In 1990?
A In 1990, I believe I was being treated ...
Q By?
A by doctors and psychotherapists both at that point.
Q What doctor was treating you for headaches in 1990?
A I believe my doctor was -- I don't remember her name but it will be part of your records, Mr. Croft.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE JUDICIAL DISTRICT OF ALASKA

SHERRY L. MCGINNIS	) Case No. A94-
	) 385CV (JWS)
Plaintiff,	)
	) DECLARATION OF
ANCHORAGE SCHOOL DISTRICT)	STEVEN C. FINLEY
ANCHORAGE EDUCATION	) IN SUPPORT OF
ASSOCIATION,	) OPPOSITION TO
and CHANCY CROFT and	) DEFENDANT
JOHN PATTERSON as	) CROFT'S MOTION
individuals	) FOR RULE 11
	) SANCTIONS
Defendants.	)
	)

I, Steven C. Finley, declare as follows:

1. I have been attorney of record in this action for plaintiff since July 1, 1996.

2. Prior to agreeing to represent the plaintiff in this action, I spent 17 hours in May and June of 1996, interviewing plaintiff in person and on telephone with respect to the allegations made in her complaint on file, I reviewed the complaint, plaintiff's initial disclosure made pursuant to Federal Rule of Civil Procedure 26 and the accompanying documents filed with the court, consisting of two boxes of copies of evidentiary materials pertaining to plaintiff's claims.

3. At the time of these discussions with plaintiff, she indicated to me that her present attorney Judith Oakes was insufficiently experienced to take the case to trial and that she sought more experienced counsel.

4. At the time of our discussions, plaintiff provided to me a detailed recollection of the

substance of her deposition which had been taken in 1995. At that time she had not as yet ordered a copy of her deposition. I immediately arranged for a copy of the deposition to be ordered and once all three volumes were received, I completed my review of the deposition transcript by August 26, 1996.

5. After receiving the court's order of July 5, 1996 ruling on defendant's motions for summary judgment and motion to dismiss, and reopening discovery for a limited period, I believed that the remaining issues in the litigation were now well defined and proceeded to conduct and participate in discovery, including the continued deposition of plaintiff by telephone in Hobbs, New Mexico, the depositions of witnesses William McGinnis and Terry Baty which took place, again by telephone, in Anchorage, Alaska and Las Vegas, Nevada, and serving written discovery requests upon defendants Croft and ASD.

6. Upon receipt and review of defendant Croft's motions for summary judgment in December 1996, I made no attempt to oppose the motions in regard to plaintiff's causes of action for conspiracy or intentional misrepresentation, or in regard to infliction of emotional distress, other than to state that the discovery sanction in favor of defendant ASD (prohibiting plaintiff from introducing damages as to emotional distress) should not operate to similarly bar plaintiff from introducing such evidence against defendant Croft.

7. I have never received any demand, formal or informal, from defendant Croft requesting that any pleading or part of any pleading be withdrawn or corrected on the basis that it is frivolous or otherwise; nor have I ever received any advance notice from defendant Croft of his intention to file a Rule 11 motion.

8. The arguments made and evidence introduced in opposition to Croft's motions for summary judgment were not presented for any improper purpose, were based upon legal research conducted, and discovery and investigation of the case and were not frivolous.

9. After receiving the court's ruling on defendant Croft's motions for summary judgment, and after being unable to settle the remaining claims with defendant Croft, both plaintiff and I determined that the amount of monies involved in the remaining claims rendered them uneconomic and impractical to proceed to trial.

10. Accordingly, plaintiff ordered, and Croft accepted, a stipulation to dismiss these claims with prejudice, but without prejudice to plaintiff's right to appeal the court, grant of summary judgment in favor of defendant Croft or to introduce admissible evidence of the facts underling the reaming claims being dismissed.

11. I have expended 19.1 hours in reviewing, researching and responding to defendant Croft's motion for Rule 11 Sanctions. My usual hourly billing rate is $200.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is within my personal knowledge and is true and correct. Executed at San Francisco, California this 26th day of February, 1998.

s/_____
Steven C. Finley

Alaska substantive law allows proof of breach of ethical obligations to be used as evidence of an attorneys negligence in a subsequent malpractice action. However, the issue now before the Court is much simpler. [73]

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73 Plaintiff's proof of Croft's negligence and conspiracy with ASD are reserved for trial, but are not at issue here for purposes of Plaintiff's summary adjudication motion.

Introduction

McGinnis' brief only addresses the issues of Negligence (A through C), Breach of Contract (D and E), Conspiracy (F), (G) Emotional Distress and Misrepresentation (H). All other issues are deemed waived. Of the 5 issues argued by McGinnis in this appeal 4 - negligence, conspiracy, emotional distress and misrepresentation - were the subject of summary judgment motions by Croft which McGinnis did not oppose in the trial court. The fifth - breach of contract - was voluntarily dismissed by McGinnis on October 27, 1997.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ALASKA

Case No.: A94-385 CIV (JWS)

Stipulation to Dismiss With Prejudice the Remaining Claims Against Chancy Croft

Plaintiff, Sherry McGinnis (McGinnis), through her attorneys, Finley and Deaton, and Defendant Chancy Croft (Croft), stipulate to the dismissal with prejudice of the remaining claims against Croft pursuant to the following terms:

1. By Order dated April 4, 1997 the Court, at page 11, granted partial summary judgment in favor of Croft as to all claims asserted by McGinnis in her complaint against him with the exception of "cause of action 9 as to the additional medical expenses, interest and penalty." These "remaining claims" of cause of action 9 are the subject of this stipulation:

2. McGinnis agrees to dismiss with prejudice the "remaining claims" of cause of action 9 and agrees that she is forever barred from relitigating these "remaining claims" should any of her other claims that were dismissed by the Order dated April 4th 1997 be reversed on appeal and remanded for trial.

3. McGinnis and Croft agree that this stipulation to dismiss with prejudice the "remaining claims" shall in no way prejudice McGinnis' right to appeal the Court's granting of summary judgment in favor of Croft by the Order dated April 4, 1997 and, in the event of reversal, shall in no way prejudice or prevent McGinnis from introducing admissible evidence of the facts underlying the "remaining claims" but McGinnis

may not seek any recovery on those "remaining claims".

4. McGinnis and Croft agree that this stipulation to dismiss the remaining claims shall in no way prejudice whatever right Croft has to move for and obtain an award of costs and attorney's fees.

DATED this 29th day of October, 1997 at Anchorage, Alaska.

CHANCY CROFT LAW OFFICE

s/_____
CHANCY CROFT
ABA 6404010

DATED this 27 day of October, 1997 at San Francisco, California.
FINLEY & DEATON
Attorneys for Plaintiff

s/_____
STEVEN FINLEY